

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2046

TO BE ARGUED BY:
Michael J. Obus

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

TAYLOR DILLARD, :

Petitioner-Appellant :

- against - :

J. EDWIN LaVALLEE, Warden of the :
Clinton Correctional Facility, and :
BENJAMIN WARD, Commissioner of the :
New York State Department of :
Correctional Services, :

Respondents-Appellees :

-----x

DOCKET NO. 77-2046

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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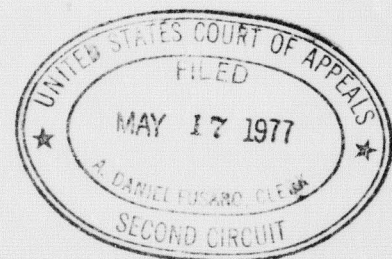


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PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a writ of habeas corpus, entered on April 4, 1977, by the Honorable George C. Pratt, a Judge of the United States District Court for the Eastern District of New York. The order and opinion are unreported and are reproduced at pages 1 through 9 of the Appendix.

In the District Court the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

OPINION AND ORDER BELOW

On April 4, 1977, the United States District Court for the Eastern District of New York (Pratt, J.) filed a memorandum of decision and order dismissing petitioner's application for a writ of habeas corpus (see pp. 1 through 9 of the appendix for complete decision). In that court, petitioner contended that he had been denied equal protection of the laws, as guaranteed by the Fourteenth Amendment, by being sentenced in the County Court of Nassau County, New York, as a second felony offender pursuant to section 70.06 of the New York Penal Law (A-12). The District Court noted that that statute "exempts from its operation a person who after being convicted of a Penal Law felony (e.g., robbery) is then convicted of a non-Penal Law felony (e.g., driving while intoxicated) while it serves to punish more severely one, like petitioner, who commits the same crimes in the reverse order" (A-5). Applying the "rational basis" test (A-7), however, the court found that the statutory scheme is "both rational and well within the legislative discretion" (A-8).

THE ISSUE PRESENTED

Does the classification of certain multiple offenders, under section 70.06 of the New York Penal Law, on the basis of the order of their offenses violate the equal protection clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

On February 3, 1975 the petitioner was convicted after a jury trial in the County Court of Nassau County of robbery in the first degree, a class "B" felony, and sentenced, over petitioner's objection, as a second felony offender to an indeterminate term of imprisonment with a minimum of four and one-half years and a maximum of nine years. The second felony offender adjudication was based upon petitioner's conviction in 1971 for driving while intoxicated as a felony [New York Vehicle and Traffic Law §1192(5)].

On direct appeal to the Appellate Division of the Supreme Court for the Second Judicial Department petitioner contended that application of the second felony offender statute to him was violative of the equal protection clause of the Fourteenth Amendment. The Appellate Division affirmed the conviction and sentence without opinion [People v. Dillard, 52 A.D. 2d 893 (2d Dept., 1976)] and leave to appeal to the New York Court of Appeals was denied [People v. Dillard, 39 N.Y. 2d 1062 (1976)] (A-30, 31).

On April 4, 1977 the United States District Court for the Eastern District of New York denied petitioner's application for a writ of habeas corpus (A 1-9). A certificate of probable cause was issued by that court on April 11, 1977 (A-11), and a notice of appeal was timely served and filed (A-10).

STATEMENT OF FACTS

Before his trial in the County Court of Nassau County, petitioner sought a ruling that his prior conviction in 1971 for driving while intoxicated as a felony would not qualify as a predicate felony conviction within the meaning of New York Penal Law §70.06 (A13-19). The application was renewed and denied before the imposition of sentence (A25). The Nassau County Court then sentenced petitioner as a second felony offender to an indeterminate term of imprisonment of four and one-half to nine years, the minimum sentence permitted by the New York second felony offender statute (A28). The court indicated, however, that it believed the mandatory sentence, which it was constrained to impose by virtue of the second felony offender statute, was unduly harsh (A27-28).

ARGUMENT

THE APPLICATION OF THE NEW YORK SECOND FELONY OFFENDER STATUTE TO PETITIONER VIOLATED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS

Petitioner was found to be a second felony offender within the meaning of the New York second felony offender statute (N.Y. Penal Law §70.06) on the basis of a prior conviction in 1971 for driving while intoxicated as a felony. However, had his present conviction for robbery preceded his conviction for driving while intoxicated as a felony, i.e. had he committed his offenses in the reverse order, he would have been sentenced as a first felony offender. People v. Tyler, 46 A.D.2d 997 (4th Dept., 1974); People v. Speranza, 80 Misc. 2d 798 (County Ct. of Nassau Co., 1974); see also People v. Ricchiutti, 82 Misc.2d 399 (County Ct. of Nassau Co., 1975). Merely the fact that he committed his felonies in a particular order has subjected petitioner to the harsher penal sanctions which mandatorily follow adjudication as a second felony offender. This classification of multiple offenders based solely on the order in which offenses are committed has no rational basis and violates the equal protection clause of the Fourteenth Amendment by whatever standard it is tested. Reed v. Reed, 404 U.S. 71 (1971); United States v. Thompson, 452 F.2d 1333 (D.C. Cir.), cert. denied, 405 U.S. 998 (1971).

Under section 70.06 of the Penal Law* a defendant can be found to be a second felony offender only if he stands convicted of a felony defined within that "chapter" (referring to the Penal Law). While any felony committed in New York will suffice as a predicate felony under the statute, including felonies defined outside the Penal Law such as driving while intoxicated as a felony [Vehicle and Traffic Law §1192(5)] and possession of untaxed cigarettes [Tax Law §481(2)], a second felony must be a Penal Law felony to bring the defendant within its scope.

* When petitioner was sentenced, N.Y. Penal Law §70.06 read, in pertinent part, as follows:

1. Definition of second felony offender.
 - (a) A second felony offender is a person who stands convicted of a felony defined in this chapter, other than a class A felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph b of this subdivision.
 - (b) For the purpose of determining whether a prior conviction is a predicate felony conviction, the following criteria shall apply:
 - (i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized irrespective of whether such sentence was imposed;
3. Maximum term of sentence. The maximum term of an indeterminate sentence of a second felony offender must be fixed by the court as follows:
 - (a) For a class B felony, the term must be at least nine years and must not exceed twenty-five years;
4. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a second felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

Thus, if one commits a felony defined outside the Penal Law first and another defined within it second, as was the case with petitioner, he will be classified as a second felony offender and sentenced accordingly to a mandatory prison term. If the order of the offenses is reversed, however, he cannot be classified as a second felony offender and will be eligible for lesser penal sanctions.* The effect of this statute is to create an arbitrary distinction in sentencing status among multiple offenders who have committed identical offenses on the basis of the order in which the offenses were committed.

A. THE NEW YORK SECOND FELONY OFFENDER
STATUTE IMPINGES ON THE FUNDAMENTAL
RIGHT TO PERSONAL LIBERTY AND SHOULD
BE SUBJECTED TO STRICT SCRUTINY UNDER
THE EQUAL PROTECTION CLAUSE

The right to personal liberty is fundamental and is one which is essential to the existence of many other fundamental rights. Since the second felony offender statute, with its provisions for mandatory minimum terms of imprisonment, directly impinges on this right, its application should be subjected to strict scrutiny and should be upheld only if justified by a compelling state interest. United States v. Thompson, supra; Skinner v. Oklahoma, 316 U.S. 535 (1942).

* The Nassau County Court indicated at the imposition of sentence that it would have given petitioner a less severe sentence if it had not been bound by the provisions of section 70.06 of the Penal Law (A27-28).

The Supreme Court has frequently stated that the liberty of a criminal defendant is "an interest of transcending value." In re Winship, 397 U.S. 358, 364 (1970); Mullaney v. Wilbur, 421 U.S. 684, 701 (1975), both cases quoting from Speiser v. Randall, 357 U.S. 513, 526 (1958). It is because liberty is of such fundamental value that a defendant is entitled to all the protections afforded by due process, including the right to have the prosecution bear the burden of proof beyond a reasonable doubt as to every element of a crime. Mullaney v. Wilbur, supra. Unlike some recognized fundamental rights which have been found to be protected by the Constitution by implication [e.g. right of privacy, Griswold v. Connecticut, 381 U.S. 484 (1965)], the right of personal liberty is specifically protected by the Constitution in the Fifth and Fourteenth Amendments and in the habeas corpus clause of Article One (Art. 1, §9, cl. 2).

In United States v. Thompson, supra, the Court of Appeals for the District of Columbia squarely held that personal liberty is a fundamental right that triggers application of the "compelling state interest test." In Thompson the question was whether Congress could, without violating the guarantee of equal protection, impose more stringent requirements on those applying for bail pending appeal in the District of Columbia than on those who have been convicted of identical crimes outside the District of

Columbia. The court held that

where fundamental personal liberties are involved, the political process may not operate quickly or effectively enough to prevent victimization of a helpless minority. . . . Where a classification impinges on constitutional rights, the court's duty is clear, and such a classification is not permitted unless the legislature succeeds in demonstrating a "compelling interest."

Although the right asserted is not explicitly mentioned in the constitution, the courts will still "closely scrutinize" a classification limiting its exercise so long as fundamental personal freedoms are at stake The courts have been particularly careful to inspect classifications relating to the criminal process, even in cases where it could not possibly be contended that constitutional rights are involved The rights of a criminal defendant are in some sense the most basic of all, since what is at stake is no less than the freedom to be free.

. . . . [T]he right to bail is "fundamental" in that it involves issues of personal freedom in the most immediate and literal sense of those words.
[citations omitted]

Id. at 1340. Accord: United States v. Brown, 483 F.2d 1314, 1318 (D.C. Cir., 1973) (the liberty at stake in bail pending appeal is fundamental); Bell v. Hongisto, 346 F.Supp. 1392 (N.D. Cal. 1972) (bail pending appeal); Palmore v. Superior Court of the District of Columbia, 515 F.2d 1294 (D.C. Cir., 1975) (the right to resort to habeas corpus relief may be fundamental).

That freedom from incarceration is fundamental is perhaps most obvious in that it incorporates many other well-recognized fundamental rights. When the state incarcerates a criminal defendant, it most assuredly revokes

his fundamental freedom to walk about, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 686 (D. Mass., 1973); to travel between states, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969); to associate freely with persons of one's own choice, Kusper v. Pontikes, 414 U.S. 51 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Button, 371 U.S. 415 (1963); to retain one's privacy, Roe v. Wade, 410 U.S. 113, 152-53 (1973); to choose and maintain one's family relationships, Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Loving v. Virginia, 383 U.S. 1, 12 (1967); and "to be let alone," a right which Mr. Justice Brandeis termed "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

Marshall v. United States, 414 U.S. 417 (1974), relied upon by the court below, is not dispositive of the issue of the appropriate standard to apply in this case. While Marshall does discuss a challenge to a federal sentencing statute for narcotic addicts (Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §4251 ff.) similar to the New York second felony offender law in that it disqualifies from consideration for rehabilitative treatment those with two prior felony convictions, the case does not discuss the right at issue herein -- the right to freedom from

incarceration. The right at stake in Marshall, which the Court found not to be fundamental, is the right to "rehabilitation from narcotics addiction at public expense after conviction of a crime." Id. at 421. Marshall does not equate rehabilitative treatment with liberty because under the federal statute a defendant is committed to the custody of the United States Attorney General for treatment. 18 U.S. C. §4253(a).

While the rational basis test was applied in McGinnis v. Royster, 410 U.S. 263 (1973), also cited by the District Court, it should be noted that the issue of the applicable standard had not been litigated since it was conceded by the petitioner-appellant that the rational basis test was appropriate. Royster is also distinguishable in that it involved "good time" credit (and not length of sentence) which has been held not to be a fundamental right, but "a matter of legislative grace." People ex rel McNeil v. New York State Board of Parole (2d Dept., 1977), N.Y.L.J., May 11, 1977, at 12, col. 6; see People ex rel Wayburn v. Schupf, 39 N.Y.2d 682 (1976) [pretrial detention impinges on fundamental right to liberty].

In United States ex rel Mercogliano v. County Court, 414 F.Supp. 508 (E.D.N.Y., 1976), aff'd., ____ F.2d ____ (2d Cir., 1976), the court did apply the rational basis test in evaluating an unrelated provision of the statute in question here. Again, the question of what standard to apply was not

raised and petitioner contends that strict scrutiny should have been applied.*

At the very least, a more substantial basis should be required of a statute which increases one's term in prison than, for example, one which regulates the licensing of opticians. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955). In Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 173 (1972), the Court indicated that a balancing of interests is appropriate when it stated, "The essential inquiry...is...inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" The Weber decision has been interpreted as marking at least a partial departure from the traditional two-tier framework of equal protection analysis [Matter of Malpica-Orsini, 36 N.Y.2d 568, 574-575 (1975)] and increasing dissatisfaction with that approach has been noted. Montgomery v. Daniels, 38 N.Y.2d 41, 61 (1975); Matter of Malpica-Orsini, supra, at 582 (dissenting opinion of Jones, J.); see San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 70- 135 (1973), dissenting opinion of Mr. Justice Marshall). Under such a "sliding-scale" standard, requiring at least a substantial state interest, the challenged classification of the New York second felony statute must fall. Even under the "rational basis" test, however, differentiation in sentencing treatment based upon

*While the decision of the District Court in Mercogliano may have persuasive authority, the affirmance by this Court has no precedential value whatever because the affirmance was by summary order. Rules of the United States Court of Appeals for the Second Circuit §0.23; United States v. Joly, 493 F.2d 672, 675 (2d Cir., 1974); United States v. Diggs, 497 F.2d 391, 393 n.3 (2d Cir., 1974).

the order in which offenses are committed does not bear a fair and substantial relation to the object of the legislation.

B. THE CLASSIFICATION OF MULTIPLE
OFFENDERS ON THE BASIS OF THE
ORDER OF THEIR OFFENSES BEARS
NO RATIONAL RELATION TO THE
OBJECT OF THE SECOND FELONY
OFFENDER STATUTE

The legislative purpose of the New York second felony offender statute, as found by the court below, is to provide for "incarceration and isolation of repeating offenders " (A-6) [emphasis added]. See People v. Butler, 46 A.D. 2d 422 (4th Dept., 1975); People v. Gennaro, 216 A.D. 533, 537 (1st Dept., 1941); People v. Bergman, 176 A.D. 318 (2d Dept., 1916). Petitioner submits that the statute's classification of multiple offenders on the basis of the order of their offenses does not advance this purpose in any way.

In the court below and in the State courts respondent has put forth a two-fold argument in support of the classification challenged here. First, he asserts that driving while intoxicated as a felony is "not as directly anti-social" as the "traditional crimes" defined in the Penal Law. Upon this premise he concludes that the second felony offender statute rationally advances the State's interest in punishing more severely those defendants who have committed felonies in an "ascending" order of seriousness. Neither his premise nor his conclusion is supported by authority.

It has been recognized that the most meaningful criterion by which the seriousness of an offense can be measured is the maximum authorized sentence. Baldwin v. New York, 399 U.S. 66, 68 (1970); Duncan v. Louisiana, 391 U.S. 145, 159-61 (1968). Indeed, the courts have upheld New York's employment of the length of authorized sentence (in excess of one year) as the measure by which to determine whether convictions from foreign jurisdictions are serious enough to qualify as predicate felonies for the purposes of the second felony offender statute.* United States ex rel. Mercogliano v. County Court, 414 F. Supp. 503 (E.D.N.Y.) aff'd. ___ F.2d ___ (2d Cir., 1976); People v. Parker, 41 N.Y. 2d 21 (1976). The permissible sentences for all felony offenses in New York have been designated by the legislature through a system of letter classifications which "govern the classification and designation of every offense, whether defined within or outside [the Penal Law]." Penal Law §§55.00, 55.05. While a second conviction for driving while intoxicated is designated simply as a "felony" in Vehicle and Traffic Law §1192(5), this offense is classified an "E" felony by Penal Law §55.10(1)(b). As with other class "E" felonies, New York law authorizes a term of imprisonment of up to four years for such a conviction. Penal Law §70.00(2); People v. Messinger, 35 N.Y. 2d 987 (1975); People v. Yost, 52 A.D. 2d 577 (2d Dept., 1975);

*Subsequent to petitioner's sentencing, Penal Law §70.06 (1)(b)(i) has been amended to require that a foreign predicate felony be one for which a sentence in excess of one year was authorized in that jurisdiction "and is authorized in [New York] state. . ." L. 1975, c. 784, §1.

People v. Dailey, 45 A.D. 2d 910 (3d Dept., 1974).

Apart from its designation as an "E" felony, driving while intoxicated when evaluated in terms of injury to society is as serious as many Penal Law offenses. One study has found that 36.5% of all fatal vehicular accidents were caused by alcohol. American Medical Association, Alcohol and the Impaired Driver (1970). Surely the effects of driving while intoxicated may be far more damaging than those of such "traditional" felonies as stealing property worth \$250.00 (Penal Law §155.30) or bail jumping (Penal Law §215.57). By whatever standard it is measured, driving while intoxicated must be found to be equal in gravity to any "class E" felony defined in the Penal Law.

Moving from his unwarranted assertion that driving while intoxicated is an offense of lesser seriousness than Penal Law offenses, respondent has strained to find a rational basis for the classification at issue by speculating that the legislature has determined that one who commits a non-Penal Law felony first and then proceeds to commit a felony enumerated in the Penal Law is "demonstrating an ascending degree of criminal behavior," while one who commits these offenses in the reverse order is "demonstrating a degree of rehabilitation." To pass constitutional muster under the equal protection clause, even if strict scrutiny is not applied, a statute "must still be examined to determine whether it rationally furthers some legitimate,

articulated state purpose. . ." San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973)[emphasis added]. No such articulated purpose exists here and there is no indication that the New York legislature had this rationale in mind when it enacted the second felony offender statute.

Respondent's proffered rationale ignores the fact that Penal Law §70.06 excludes all felonies defined outside the Penal Law as second felonies regardless of seriousness. For example, section 464 of the New York Labor Law states that "any person who possesses an explosive without being duly licensed or otherwise authorized to do so under the provisions of this article shall be guilty of a class D felony." (emphasis added). Can it rationally be said that one who commits this "D" felony under the Labor Law and then commits an "E" felony under the Penal Law is demonstrating ascending criminality, or that one who commits these offenses in the reverse order is demonstrating rehabilitation?

Even where non-Penal Law "E" felonies are involved, respondent's argument will not withstand scrutiny. Petitioner submits that the legislature could not have rationally determined that a defendant has shown that he is "moving up the scale of criminal behavior" when he commits a Penal Law felony such as possession of \$100 worth of slugs (Penal Law §170.60), unlawfully concealing a will (Penal Law §190.30) or offering a false instrument for filing (Penal

Law §175.30) after having been convicted of a non-Penal Law "E" felony such as falsifying a financial report regarding a nursing home or hospital (Public Health Law §2807-a), fraudulent registration of title to real property (Real Property Law §431) or misuse of food stamps worth more than \$250 (Social Services Law §147).

Furthermore, where two Penal Law felonies are involved the ascending criminality rationale totally breaks down since an offender is subject to enhanced punishment no matter what order his felonies are committed in. Under the statute, the rapist who then shoplifts property worth more than \$250 and the shoplifter who becomes a rapist are both classified as second felony offenders. Although these offenses are grossly different in seriousness, the order of their commission is irrelevant.

Thus, respondent's argument that it was appropriate to sentence petitioner as a second felony offender because robbery is unquestionably more serious than driving while intoxicated (but would not have been appropriate had the offenses been committed in the reverse order) is ill founded in that it runs contrary to the legislative purpose and internal logic of the statute which is aimed at "repeating" and not necessarily "ascending" offenders.

A comparison of the second felony offender statute (Penal Law §70.06) with the New York's "persistent felony offender statute" (Penal Law §70.10)* further undercuts respondent's argument. Under section 70.10 a defendant convicted of any felony, including a non-Penal Law felony, may receive a greatly enhanced sentence as a persistent felony offender if he has previously been incarcerated for two separate felonies. The purpose of the statute, to extend the incarceration and supervision of persons who persist in committing serious crimes after having been subjected to repeated terms of imprisonment, closely parallels that of section 70.06 (See Hechtman, Practice

*Penal Law §70.10(1):

Definition of a persistent felony offender:

(a) A persistent felony offender is a person who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

(iii) that the defendant was not pardoned on the ground of innocence.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

Commentary, McKinney's Cons. Laws of New York, Book 39, P.L. §70.10, p. 220).

That the legislature has provided for persistent felony offender treatment of non-Penal Law felony offenders clearly indicates that non-Penal Law felonies are equal in seriousness to Penal Law felonies and that the order of commission of the offenses is completely irrelevant to the purpose of either statute.

The court below did not adopt respondent's argument that felonies defined outside the Penal Law, such as driving while intoxicated, are less serious than Penal Law felonies; nor did it find that the New York Legislature had devised a rational scheme for punishing ascending criminality. In denying habeas corpus relief, however, the Court did not articulate any other rationale for distinguishing among multiple offenders on the basis of the order of offenses, and apparently did not accept, as had respondent, that such a classification was at issue.

The District Court initially found that New York could reasonably determine that "a Penal Law conviction which follows a conviction for a felony defined outside the Penal Law indicates a more serious disregard for the laws of society than does a Penal Law felony standing alone" (A-5). With this petitioner agrees. It went on to hold that "[t]he potential sentence of an ex-drunken driver now convicted

of robbery need not constitutionally be equal to that prescribed for an ex-robber now convicted of drunken driving" (A-7). With this petitioner also agrees. The robber, even without a prior drunken driving conviction, may properly receive a greater sentence than the drunken driver who has committed a robbery in the past. These propositions, however, are not in question.

While petitioner was sentenced for robbery, and not for some "hybrid felony" consisting of robbery and driving while intoxicated, his adjudication as a second felony offender was, in fact, based on a "hybrid" or combination of felony convictions, and the order of those convictions was determinative of his status. To conclude, as did the Court below, that "it is not the order of the crimes, but the identity of the second crime as a Penal Law felony which activates the second felony offender statute" (A-8), is simply to restate the problem.

Finally, the District Court's citation of United States V. Raines, 362 U.S. 17, 21 (1960) is inappropriate. In that case the Supreme Court held that it could not consider the constitutionality of a voting rights statute as applied to a hypothetical situation involving the action of private persons, where only state action was at issue. In the case at bar petitioner's claim is not a hypothetical one. He is undoubtedly a member of a class of multiple offenders who, unlike other multiple offenders convicted of the same crimes, are subject to second felony offender treatment because of the order of their offenses. As contended above, there is no rational basis for this distinction and the judgment of the District Court should be reversed.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER
OF THE DISTRICT COURT DISMISSING THE
PETITION FOR A WRIT OF HABEAS CORPUS
SHOULD BE REVERSED

Respectfully submitted,

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OF COUNSEL:

MATTHEW MURASKIN
MICHAEL J. OBUS

.....X

- against -

:

: AFFIDAVIT OF SERVICE

BY MAIL

Respondents-Appellees

Melissa Keane being duly sworn deposes and says that she is a clerk in the office of James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, N.Y., Criminal Division, attorney for the above named ~~defendant~~ petitioner-appellant TAYLOR DILLARD herein. That she is over 18 years of age, and resides at Mineola, New York. That she served the within brief and appendix on the 16th day of May 1977

upon Hon. Denis Dillon, District Attorney of Nassau County
262 Old Country Road, Mineola, New York 11501

by depositing true copies of same securely enclosed in a post-paid wrapper in the Letter Box, maintained and exclusively controlled by the United States at 400 County Seat Drive, Mineola, New York.

Melissa Keane

Sworn to before me this

16th day of May, 1977

Lucille T. Ridman

LESLIE D. RUDMAN
Notary Public, New York
No. 30-427610
Qualified in Nassau County
Term Expires March 30, 1978